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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SMITH STEEL WORKERS D.A.L.U. 19806, AFL-CIO,
Petitioner,

v.

DARREL C. NOTTELSON

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Title VII of the Civil Rights Act of 1964 provides an exemption in favor of those who object on religious grounds to paying union dues from the obligation of all employees to pay dues stated in a union security clause of a collective agreement?

2. Whether, if Title VII does so provide, thereby requiring other employees to subsidize union representation for religious objectors, the title is to that extent invalid under the Establishment Clause of the First Amendment?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Smith Steel District D.A.L.U. 19806, AFL-CIO (hereinafter "the Union"), a directly affiliated local union of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in *Darrel C. Nottelson, et al. v. Smith Steel Workers D.A.L.U. 19806, AFL-CIO, et al.*, 643 F.2d 445. A separate petition for certiorari seeking review of that judgment has been filed by A.O. Smith Corporation (hereinafter "the Company"), No. 81-97. (As the Company filed an appendix (and supplemental appendix) containing the decisions below, we cite herein to those appendices.)

OPINIONS BELOW

The district court entered three memoranda and orders. The first, dated December 7, 1979, is reported at 481 F.Supp. 756 and is reprinted in the Company's supplemental appendix beginning at B-1. The second, dated April 18, 1980, is reported at 489 F.Supp. 94 and is reprinted in the Company's supplemental appendix beginning at B-25. The third, dated September 18, 1980, is unreported and is reprinted in the Company's supplemental appendix beginning at B-45. The district court entered a judgment on April 18, 1980 which is reprinted in the Company's supplemental appendix beginning at B-19. The decision of the court of appeals is reported at 643 F.2d 445 and is reprinted in the Company's appendix beginning at A-1. The court of appeals' order denying rehearing is reprinted in the Company's supplemental appendix beginning at E-1.

JURISDICTION

The court below issued its opinion and judgment on February 27, 1981. That court issued an order denying the Union's timely petition for rehearing on April 20, 1981 (Supp. App. E). On July 13, 1981, Justice Stevens entered an order extending the time for filing this petition to and including August 18, 1981. (A copy of that order is reprinted at the back of this petition). This Court has jurisdiction to review the judgment of the Seventh Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

Section 701(j) of Title VII of the Civil Rights Act of 1964, as amended in 1972, 42 U.S.C. § 2000e-(j), provides:

> For purposes of this title—
>
> • • • •

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(c) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(c), provides:

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would

deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an application for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), provides in pertinent part:

(a) It shall be an unfair labor practice for an employer—

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . .

The First Amendment to the Constitution of the United States provides in pertinent part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

STATEMENT OF THE CASE

A. The Facts

Throughout the period of Respondent Darrel Nottelson's employment with the Company, the Union was the exclusive bargaining representative of the Company's employees, and the Company and Union were parties to successive collective agreements containing a valid union security clause requiring employees to continue membership in the Union as a condition of employment. In 1966, Nottelson became a member of the Seventh Day Adventist (hereinafter "SDA") Church. A basic tenet of this religion provides that its members not join or financially support labor unions, although each member may personally decide whether to follow the tenet. Nottelson remained a member of the Union, and continued his dues payments, until December, 1974, at which time he notified the Company and Union that his religious beliefs prevented him from any longer belonging or paying dues to the Union, but that he was willing to contribute an amount equal to union dues ($10 per month) to a non-religious charity. Effective January 1, 1975, Nottelson discontinued dues payments to the Union, and commenced making monthly contributions in an equal amount to the American Cancer Society.

In March, 1975, the Union notified Nottelson that he would have to resume his dues payments, and pay his delinquent dues, else the Union would insist upon his discharge from employment pursuant to the union security clause. The Company notified Nottelson that it was willing to continue him in employment if the Union was willing to forego receipt of his dues, but not otherwise. On April 15, 1975 the Union expelled Nottelson from membership for non-payment of dues. In May, 1975, the Union offered to release Nottelson from any obligation to be a Union member, and to forego insisting upon his discharge if he would pay a representation fee

to the Union in an amount equal to dues. Nottelson refused to make any payments to the Union as inconsistent with his religious beliefs, and on July 11, 1975 the Company discharged him in response to the Union's statement that if the Company did not comply with the agreement the Union would file an unfair labor practice charge and a grievance.[1]

B. The Decisions Below

Nottelson filed a charge with the Equal Employment Opportunity Commission, received a right to sue letter, and initiated this action.[2] Following trial, the district court concluded: that the Company and Union had violated Title VII's "reasonable accommodation" requirement (§ 701(j)) by discharging Nottelson rather than accepting his offer to pay amounts equal to union dues to charity (B-3-14);[3] that insofar as that requirement invalidates *pro tanto* union security agreements permitted by § 8(a)(3) of the National Labor Relations Act, "Title VII takes precedence over the NLRA" (B-30); and that § 701(j) as thus construed is not invalid under the Establishment Clause of the First Amendment, because "[i]t is a neutral provision with a satisfactory

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[1] Nottelson was initially discharged on April 24, 1975, but was reinstated six days later pursuant to a temporary restraining order issued by the district court. The TRO, with extensions, expired on July 10, 1975, and Nottelson was discharged again the following day.

[2] The instant suit was filed before Nottelson received a right to sue letter from the EEOC, was dismissed for that reason on July 10, 1975, without prejudice to its being reactivated upon receipt of such a letter, and was reactivated following issuance of an EEOC right to sue letter on July 21, 1975.

[3] Throughout this brief, "B" refers to the pages so numbered in the Supplemental Appendix filed with the Company's petition, No. 81-97, and "A" refers to the pages so numbered in the appendix bound with the Company's petition.

purpose—to prevent discrimination resulting from the unreasonable refusal to accommodate religious beliefs and practices" (B-35, quoting and following *Tooley v. Martin-Marietta Corp.*, 476 F.Supp. 1027, 1030 (D. Ore. 1979).[4]

The Company and Union appealed, and the EEOC was granted leave by the court of appeals "to intervene on plaintiff's behalf" (A-6). The court of appeals (Judge Pell dissenting) affirmed the district court's decision in all material respects. That court "agree[d]" with the district court that "Title VII creates an exception to the NLRA's sanction of union security clauses" (A-7). And the court of appeals concluded that Title VII as thus construed is constitutional, relying on *Rankins v. Commission on Professional Competence*, 24 Cal. 3d 167, 593 P.2d 852 (1979), appeal dismissed for want of a substantial federal question, 444 U.S. 986 (holding that the Establishment Clause as incorporated into the Fourteenth Amendment is not offended by a state requirement that school boards "reasonably accommodate" the desires of teachers to take leave without pay to observe their holy days when substitutes are available) (A-12-13), and on the "principle of supremacy of conscience" declared in *Gillette v. United States*, 401 U.S. 437, 448-460 (holding that the selective service exemption for religious objectors does not violate the Establishment Clause).

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[4] As remedies, the court ordered the Company to reinstate Nottelson to employment; ordered the Company and Union to pay him backpay in the amount of his lost wages; enjoined the Company and Union from effecting his discharge for refusing to make payments to the Union so long as he makes payments of amounts equal to union dues to a non-union non-religious charity mutually agreed upon by Nottelson and the Union; and ordered the Company and Union to pay his attorney's fees (B-19-23, 49-50). The court also enjoined the Union from filing an NLRB charge alleging that the Company's retention of Nottelson on these terms violated the Union's rights under the NLRA (B-23, 42-43).

Judge Pell dissented from the majority's ruling on the constitutional issue. He rejected the majority's reliance on *Rankins* because the accommodation obligation in *Rankins* did not have an adverse impact upon either the school board or other employees (A-20-21), and far from creating a "preference of one religion over another" it *lessened* religious preference because the regular school calendar provided holidays on the principal Christian holy days (A-21). As for *Gillette*, Judge Pell answered the majority's contention that charitable contributions are a means by which religious dues objectors could "fulfill their societal obligations in a different manner:"

> The fact should not be significant that by paying over to a charity an amount equivalent to dues Nottelson expands the same amount of money as does another employee who may not be in favor of the Union representing him but who cannot fall back upon a claimed religious tenet. The merchant who sells merchandise, or the lawyer who sells service, would scarcely regard that he was receiving a quid pro quo to which he was entitled if the price or the fee was instead paid over to a charity no matter how worthwhile or deserving that other recipient might be. No more, it seems to me, should Nottelson be entitled to the services without paying for them in the same manner as his fellow employees. In sum, he is a "free rider," plain and simple. [A-18-19].

Petitions for rehearing filed by the Company and Union were denied, and their suggestions of rehearing *en banc* were denied, apparently by an evenly-divided court. (The order recited that "a majority of the active members of the Court have not voted to grant a rehearing *en banc*," but noted that "Chief Judge Fairchild and Circuit Judges Pell, Wood and Bauer voted to grant the petition" (E-2).)

REASONS FOR GRANTING THE WRIT

This case involves two issues that Congress and this Court have found sensitive and difficult: the issue of the extent to which employees represented by a union should be required to financially support their exclusive representative and the issue of the extent to which religious objectors should be exempted from otherwise uniform financial requirements.

The court below and three other courts of appeals [5] have reached the unlikely conclusion that Congress has dealt with the problem presented by passing two laws—Title VII of the Civil Rights Act of 1964 as amended and the National Labor Relations Act as amended—that set out differing substantive rules governing the obligations of religious objectors covered by union security agreements, and differing procedures for enforcing those rules. But the legislative history of Title VII leaves no doubt that Congress intended the NLRA and the NLRA alone to regulate this subject. We therefore submit that the lower courts' expansive reading of Title VII is palpably wrong. Those courts have failed, and this Court must therefore assume, the judicial "responsibility to reconcile [separate congressional enactments] where feasible." *U.S. v. National Assn. Securities Dealers*, 422 U.S. 694, 720 (1975).

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[5] Fifth Circuit: *Cooper v. General Dynamics*, 533 F.2d 163 (1976), cert. denied, 433 U.S. 908; *but see* 533 F.2d at 175-176 (Rives, J., concurring in part and dissenting in part).

Sixth Circuit: *McDaniel v. Essex International*, 571 F.2d 338 (1978).

Ninth Circuit: *Anderson v. General Dynamics*, 589 F.2d 397 (1978), cert. denied, 442 U.S. 921; *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403 (1978), cert. denied, 439 U.S. 1072; *Lutcher v. Musicians Union Local 47*, 633 F.2d 880 (1980); *Tooley v. Martin Marietta Corp.*, 648 F.2d 1239 (1981); *but see Yott v. North American Rockwell Corp.*, 501 F.2d 398, 399-401 (1974).

Having construed Title VII to require that the cost of providing union representation for religious objectors must be subsidized by the employees who do not share that religious objection, the lower courts also proceeded to uphold this requirement as consistent with the Establishment Clause. But, this Court has repeatedly held that a law that "single[s] out a class of . . . citizens for a special economic benefit" on the basis of religion violates the Establishment Clause. *Sloan v. Lemon*, 413 U.S. 825, 832. Those holdings rest on the Court's recognition that a principal impetus for adoption of the Establishment Clause was the aversion to governmentally-compelled tithing exemplified by Madison's Remonstrance that government should not be permitted to "force a citizen to contribute three pence only of his property" to support religion. The lower courts believed that the doctrine announced in *Gillette v. United States*, 401 U.S. 437, which recognized in the selective service context "the principle of supremacy of conscience," makes the basic rule against forced subsidization of another's religious beliefs inapplicable here. We recognize that the task of resolving the apparent tension between *Sloan* and *Gillette* is more difficult than the task of reading Title VII and the NLRA in conjunction. What is at stake here is whether those decisions are to be synthesized in a manner which effects a fundamental redefinition of the application of the Establishment Clause to subsidization cases. That, we submit, is plainly an issue to be decided by this Court.

I. The Relationship Between Tile VII and the NLRA.

Congress' determinations concerning the legality of various forms of union security are a central component of the national labor policy. As the Senate Report on the legislation that emerged as the Labor Management Relations Act of 1947 observed, "[a] controversial issue to which the committee has devoted the most mature

deliberation has been the problem posed by compulsory union membership." S. Rep. No. 105 on S.1126, 80th Cong., 1st Sess., p. 5. The outcome of the 1947 debate was to make the closed shop unlawful, to permit, as a matter of federal law, employers and unions to negotiate union shop and agency shop agreements, and to grant the states the option of enacting laws invalidating such agreements. See §§ 8(a)(3) and 14(b) of the NLRA as amended. "It is well known, and the legislative history of the 1947 Taft-Hartley amendments plainly shows, that § 8(a)(3)—including its proviso—represented the Congressional response to the competing demands of employee freedom of choice and union security." *Machinists Local v. Labor Board*, 362 U.S. 411, 418, n. 7.

At the time this case arose it was clear that under the NLRA union security agreements which require *all* unit employees "to pay their way" (*Labor Board v. General Motors*, 373 U.S. 734, 740-741 (1963)) by providing financial support for the exclusive representative obligated to serve all those employees equally (*Vaca v. Sipes*, 386 U.S. 171, 177 (1967)) were entirely lawful. Indeed, the efforts of religious objectors to invalidate such agreements under the Free Exercise Clause of the First Amendment had been uniformly rejected, the courts finding a "compelling governmental interest" in "requir[ing] a fair sharing of the costs of collective bargaining." *Linscott v. Millers Falls Co.*, 440 F.2d 14, 17 (1st Cir. 1971), *cert. denied*, 404 U.S. 872; see also *Gray v. Gulf, Mobile & Ohio R.R. Co.*, 429 F.2d 1064, 1072 (5th Cir. 1970), *cert. denied*, 400 U.S. 1001; *Otten v. Baltimore & O. R. Co.*, 205 F.2d 58, 61 (2nd Cir. 1953).[6]

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[6] Judge Learned Hand wrote in *Otten*, 205 F.2d at 61:

> The First Amendment . . . gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. A man might find it incompatible with his conscience to live in a city in

The courts below proceeded as if Title VII is as a matter of course to be given priority over the NLRA. That approach is inconsistent with this Court's decision in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). There the Court held that Title VII's prohibition of religious discrimination is not to be construed to undercut decisions made by Congress which "lie[] at the core of our national labor policy" without a "clear and express indication from Congress" that it is so intended. *Id.* at 79. Thus, unless Congress in enacting and amending Title VII evinced an intent to regulate union security agreements through that Act as well as through the NLRA, such agreements are regulated solely by the NLRA. Congress evinced no such intent.

There is no evidence in the legislative deliberations over Title VII—either in 1964, when the ban on religious discrimination was enacted, or in 1972, when § 701(j) was added to codify the EEOC's requirement of "reasonable accommodation"—that Congress intended to overturn the decisions respecting union security made in 1947. The exemption of religious objectors from union dues was never mentioned in the 1964 debates, and the EEOC, although construing the 1964 Act's ban on religious discrimination to require "reasonable accommodation", did

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which open saloons were licensed; yet he would have no constitutional right to insist that the saloons must be closed. He would have to leave the city or put up with the *iniquitous dens*, no matter what economic loss his change of domicile entailed. We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations of a better world.

not understand that requirement to entail exemption of religious objectors from the scope of union security agreements:

> The Commission was . . . required to determine whether an employee in a union shop may refuse to pay union dues on the grounds that such payments are prohibited by his religious beliefs. The Commission held that ". . . a union shop is not unlawful" and that Charging Party's refusal on religious grounds is protected by neither Title VII nor the First Amendment. [Sixth Annual Report, Equal Employment Opportunity Commission, p. 12 (March 30, 1972)].

Section 701(j) was added in 1972 "to resolve by legislation" doubts as to the correctness of the EEOC's understanding that the 1964 Act required "reasonable accommodation" (*Hardison*, 432 U.S. at 73-74). The concern which promoted its enactment—and indeed the only concern specifically discussed during the brief debate—was the plight of Sabbatarians whose ability to obtain and hold jobs was hampered by employer requirements of Saturday work. 118 Cong. Rec. 705-706 (1972). The "reasonable accommodation" which its sponsor sought to assure was that "employers on some occasions . . . adjust work schedules to fit the requirements of the faith of some of their workers." *Id.* The legislative history of § 701(j), which spans less than two pages of the Congressional Record, *id.*, contains no reference whatever to the subject of union dues. That Congress did not have union security agreements in mind when it enacted § 701(j) is particularly evident from the language of that provision, which speaks only of an "employer" duty to "reasonably accommodate".[7]

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[7] The courts of appeals which have construed § 701(j) to reach union security agreements have acknowledged the incongruity between their rulings and the language of § 701(j), albeit remaining

In contrast to the total absence of congressional consideration of union security in the context of Title VII, contemporaneous with the enactment of Title VII in 1964 and with its amendment in 1972, proposals to create an exemption from union security for religious objectors continuously were introduced in the form of proposed amendments to the NLRA. Religious objectors (and particularly the SDA Church) have repeatedly urged Congress to amend the NLRA to provide them an exemption from union security agreements.[8] Between 1965 and 1973, 8 bills were introduced seeking to amend § 8(a)(3) to create a dues exemption for religious objectors who offer to make equivalent payments to charities; none was enacted.[9] And the contemporaneous understanding of Congress that Title VII did not overturn the decisions respecting union security made in the 19.. amendments to the NLRA is dramatically evidenced by

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unwilling to draw the inference that Congress did not intend to reach union security agreements. See, *e.g.*, *Cooper*, *supra*, 533 F.2d at 170-171 (Gee, J.), 172-173 (Brown, C.J.), 175 (Rives, J.); *McDaniel*, *supra*, 571 F.2d at 344; *Yott v. North American Rockwell Corp.*, 602 F.2d 904, 909 (9th Cir. 1979), *cert. denied*, 445 U.S. 928; *Tooley*, *supra*, 648 F.2d at 1241; *and see* the decision below (A-4 n. 4).

[8] There are at least seven religions whose tenets include conscientious objection to financial support of labor unions. SDA (which has approximately 500,000 members) is the largest. Others are the Amish, Mennonites, National Association of Evangelicals, Christian Missionary Alliance, Old German Baptist, and Plymouth Brethren IV. 123 Cong. Rec. 36275 (1977).

[9] *Prior to the enactment of §701(j) in 1972.* Three bills were introduced in 1965 (89th Cong., 1st Sess.): H.R. 8962, 111 Cong. Rec. 13295, 18631; H.R. 9619, 111 Cong. Rec. 15558; H.R. 11666, 111 Cong. Rec. 27482. Two bills were introduced in 1966 (89th Cong., 2d Sess.): S. 3203, 112 Cong. Rec. 7844, 7847-48; S. 3153, 112 Cong. Rec. 6876, 6879. One bill was introduced in 1967 (90th Cong., 1st Sess.): H.R. 7683, 113 Cong. Rec. 7764. One bill was

legislative events surrounding proposed amendments to the NLRA immediately following enactment of § 701(j).

In 1973 a bill was introduced in the Senate to expand the NLRA's definition of "employer" to embrace non-profit hospitals, which until then had not been covered by the NLRA. That bill was of paramount interest to the SDA Church, which operated 49 hospitals and nursing homes in the United States. Leg. Hist. at 285.[10] Spokesmen for the Church testified at hearings on the bill in 1973 that existing law provided no exemption for religious dues objectors, and they urged *inter alia* an amendment providing "some kind of exemption" from dues obligations under union shop agreements for those employees with religious objections to such payments. *Id.* at 120-121, 132.

The Committee reported out the bill to extend NLRA coverage to the health care industry without any dues exemption. In the course of the Senate debate, Senator Dominick proposed an amendment which would have pro-

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introduced in 1970 (91st Cong. 2nd Sess.): S. 4008, 116 Cong. Rec. 20928.

Subsequent to enactment of § 701(j) in 1972. One bill was introduced in 1973 (93rd Cong., 1st Sess.); S. 2109, 119 Cong. Rec. 22208.

In 1974 Congress did create a *partial* exception, applicable only to the health care industry, by enacting § 19 of the NLRA. See pp. 15-17, *infra*. And in December, 1980, Congress amended § 19 to provide a form of exemption in all industries. See pp. 17-18, *infra*.

[10] Throughout this petition, we will use the term "Leg. Hist." to refer to *Legislative History of the Coverage of Non-profit Hospitals under the NLRA, 1974*, published by the Senate Committee on Labor and Public Welfare, 93rd Cong., 2nd Sess. (Committee Print 1974).

vided a religious dues exemption not merely for employees in that industry, but for all employees covered by the NLRA, so long as an equivalent amount were contributed to charity. *Id.* at 193. He observed that "as we all know" there was no such exemption under existing law, *ibid.* He reminded his colleagues that "a few years ago" the SDA Church had urged Congress to provide such an exemption, but that the sought-after exemption had not been enacted. *Id.* at 193-194. Senator Dominick explained that, in consequence, under existing law members of the SDA Church were required to forego employment in bargaining units covered by union shop agreements in order to remain faithful to their religious beliefs, and he urged that "there ought to be something in the law which makes this type of employment available for people who hold these religious beliefs. . . ." *Id.* at 196.

Senator Dominick's proposal met with vigorous opposition. Senator Javits agreed that existing law required SDA members to "pay their part of the cost," *id.* at 200, and he dismissed Senator Dominick's proposed substitute (that religious objectors pay an equal amount to charity) as not "mean[ing] anything to the union in question which has to bear the cost. The union has an interest in avoiding 'free riders'." *Ibid.* See also *id.* at 203-204. (Sen. Taft). The Dominick amendment was tabled, *id.* at 212, and the bill to extend NLRA coverage to nonprofit hospitals was passed by the Senate without any provision for exemption of religious dues objectors, *id* at 258-260.

The bill was then sent to the House, and was reported out by the House Committee with no dues exemption provision. Four congressmen appended "additional views" to the House report urging that the bill be amended to provide a dues exemption for religious objectors employed

by non-profit hospitals, there being no such exemption under existing law, *id.* at 285. When the bill reached the House floor, Representative Erlenborn proposed such an amendment, explaining that existing law contained no exemption, *id.* at 298. In the ensuing debate, proponents and opponents agreed that no such exemption then existed. *Id.* at 299, 333 (Rep. Thompson); 299 (Rep. Erlenborn); 334-335 (Rep. Green).

The Erlenborn amendment was approved by the House, *id.* at 335; the House bill was passed with an exemption for religious objectors employed in the health care industry, *id.* at 338; the Senate and House bills went to a conference at which the Senate acceded to the exemption, *id.* at 348; and both the Senate and the House approved the conference report, *id.* at 384, 408. The conferees in both houses characterized the bill as creating an "exemption" for employees in the health care industry from the requirement in all other industries that religious objectors pay dues under union shop agreements. *Id.* at 361 (Sen. Williams); 374 (Sen. Taft); 386 (Rep. Thompson).

Six years later, in December 1980, Congress amended § 19 of the NLRA to provide a form of dues exemption to all employees covered by the NLRA[11] but one which

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[11] Section 19 of the NLRA, as enacted in December, 1980, is codified as 29 U.S.C. § 169, and provides:

> Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employees' employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund exempt from taxation under section 501(c)(3) of Title 26, chosen by such employee from a list of at least three such

differs substantially from the lower courts' construction of Title VII [12] and commits enforcement to the NLRB.[13]

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funds, designated in such contract or if the contract fails to designate such funds, then to any such fund chosen by the employee. If such employee who holds conscientious objections pursuant to this section requests the labor organization to use the grievance-arbitration procedure on the employee's behalf, the labor organization is authorized to charge the employee for the reasonable cost of using such procedure.

[12] Section 19 of the NLRA contains no "undue hardship" exception as appears in § 701(j) of Title VII. On the other hand, § 19 authorizes unions to charge religious dues objectors who file grievances for the reasonable cost of using the grievance-arbitration procedure on their behalf. Section 19 extends dues exemption only to an employee who is a member of "a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations"; by contrast, as noted in the opinion below (A-15, n. 12), the EEOC "has consistently interpreted the term 'religious' in relevant portions of Title VII as having the same broad meaning as the term has as used in the religious exemption provision in the selective service statutes." As explained in the EEOC's Religious Discrimination Guidelines, 29 C.F.R. § 1605.1:

> [T]he Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views . . . The Commission has consistently applied this standard in its decisions. The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee. [Footnote omitted].

Thus, while Congress carefully shaped section 19 of the NLRA to assure that strongly-held secular views such as reflected in *Buckley v. American Fed. of Television & Radio Artists*, 496 F.2d 305 (2nd Cir. 1974), *cert. denied*, 419 U.S. 1093 and *International Union v. National Right To Work Foundation*, 590 F.2d 1139, 1143 (D.C. Cir. 1978) need *not* be accommodated, the EEOC in enforcing Title VII has opened the door to just such claims of right to exemption for secular views.

[13] Section 19 of the NLRA qualifies the proviso to § 8(a)(3) of the NLRA, and thus makes it an unfair labor practice (violative of

The lasting consequence of the error below is not to provide relief to religious objectors but to confound the substantive solution which Congress mandated in § 19 of the NLRA whose enforcement is within the NLRB's exclusive jurisdiction.

The lesson of *Teamsters v. Daniel*, 439 U.S. 551, 569-570 is therefore very much in point here:

> If any further evidence were needed to demonstrate that pension plans of the type involved are not subject to the Securities Acts, the enactment of ERISA in 1964, 88 Stat., 829, would put the matter to rest. Unlike the Securities Acts, ERISA deals expressly and in detail with pension plans. * * *
>
> The existence of this comprehensive legislation governing the use and terms of employee pension plans severely undercuts all arguments for extending the Securities Acts to non-contributory, compulsory pension plans. * * * Not only is the extension of the Securities Acts by the court below unsupported by the language and history of those Acts, but in light of ERISA it serves no general purpose * * * Whatever benefits employees might derive from the effect of the Securities Acts are now provided in more definite form through ERISA

This Court should therefore grant a writ of certiorari to remove Title VII and the EEOC from an area into which they have erroneously been thrust by the lower courts.

II. The Applicable Constitutional Principle.

Section 701(j) as construed by the lower courts requires all the other employees in the bargaining unit to subsidize the provision of union representation to Seventh

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§§ 8(a)(3) and 8(b)(2)) for an employer to discriminate against an employee protected by § 19 for refusing to pay dues or for a union to cause or attempt to cause an employer to do so.

Day Adventists and other religious objectors. Religious objectors, solely because of their religion, are accorded a benefit denied to all others, no matter how strong the latter's *secular* objections to paying union dues;[14] and those others must finance the services which the union is required to furnish to the religious objectors. As thus construed, § 701(j) poses serious Establishment Clause questions—indeed, it is unlike any governmental regulation heretofore upheld by this Court under that Clause.

This Court's decisions to date have been consistent that a law that, on the basis of religion, "single[s] out a class of . . . citizens for a special economic benefit" has a legislative effect the Establishment Clause was designed to forbid. *Sloan v. Lemon*, 413 U.S. 825, 832. As this Court has explained, the Establishment Clause was a reaction to the English practice, carried over into some of the Colonies, of governmental "taxing", or "tithing", of citizens to support religious activities. *Everson v. Board of Education*, 330 U.S. 1, 9-14. Imbued with "the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions," *id.* at 11, advocates of the First Amendment achieved an Establishment Clause which "means at least this,":

> Neither a state nor the Federal Government . . . can pass laws which aid one religion, which aid all religions, or prefer one religion over another . . . No tax in any amount, large or small, can be levied to support any religious activities. . . . [*Id.* at 15-16.][15]

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[14] That there are persons with strong *secular* objections to paying union dues is evidenced by such cases as *Buckley, supra*, and *National Right To Work Foundation, supra*, n. 12.

[15] See also, *Abingdon School Dist. v. Schempp*, 374 U.S. 203, 225, quoting Madison, Memorial and Remonstrance Against Religious Assesments, II Writings of Madison 183, 185-186.

Based upon these considerations, this Court, without exception, has struck down every statute which conferred an economic benefit exclusively, or even primarily, upon members of particular religious sects, or upon members of all religions to the exclusion of non-religionists. See, e.g., *Committee for Public Education v. Nyquist*, 413 U.S. 756, 775, 781-782, 782-783 n. 38, 788-789, 793-794; *Sloan, supra*, 413 U.S. at 830, 832; *Meek v. Pittinger*, 421 U.S. 349, 363-364.[16]

The lower courts have relied on *Gillette v. United States*, 401 U.S. 437, 453, where this Court, recognizing the tension between the Establishment Clause and the Free Exercise Clause, upheld the selective service exemption as appropriate to vindicate "the principle of supremacy of conscience."[17] See also *Wisconsin v. Yoder*,

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[16] Cases in which financial aid has been upheld all have been justified by the principle that "religious institutions need not be quarantined from public benefits that are neutrally available to all." *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736, 746. See, e.g., *Everson, supra*, 330 U.S. at 17; *Board of Education v. Allen*, 392 U.S. 236, 243; *Walz v. Tax Commission of The City of New York*, 397 U.S. 664, 671-673, 676; *id.* at 689 (Brennan, J., concurring); *id.* at 696 (Harlan, J., concurring); *Wolman v. Walter*, 433 U.S. 229, 242.

[17] The court below also thought that the result it reached was dictated by *Rankins v. Commission on Professional Competence*, 24 Cal. 3d 167, 593 P.2d 852 (1979), appeal dismissed for want of a substantial federal question, 444 U.S. 986. But as the Ninth Circuit subsequently recognized in *Tooley, supra*, "this case and *Rankins* involve entirely different kinds of religious accommodations," 648 F.2d at 1244 n. 8. See also the dissent below, A-20-21. The issue in *Rankins* was whether California could compel school boards to grant leave without pay to non-Christians who wished to observe their holy days, when substitute teachers were available. In finding no infringement of the Establishment Clause, the California Supreme Court relied exclusively upon two factors not present in the instant case.

First, permitting the plaintiff to take leave in *Rankins* "does not necessitate expenditure of money," 593 P.2d at 859. On this basis, the Court distinguished *Mandel v. Hodges*, 54 Cal. App. 3d 596,

406 U.S. 205, 234-235 n.22 (1972). The lower courts without full consideration have carried over *Gillette* to cases, such as this, in which the exemption results in compelled private subsidization along religious lines. But *Gillette* provides the occasion for further analysis; it did not set out a new synthesis. How to harmonize *Gillette* with the line of cases invalidating "special economic benefits" to particular religious sects is a delicate constitutional question this Court has not yet addressed. Indeed the Court has recognized that § 701(j), unless narrowly construed, could pose serious Establishment Clause questions. *TWA v. Hardison, supra*, 432 U.S. at 69-70 n. 4; *id.* at 89-90 and n.3 (Marshall, J., dissenting). Given the frequency with which the issue has arisen in the lower courts in the union security context, this is an appropriate case in which to undertake that important task.

610-615, 127 Cal. Rptr. 244, 253-256 (App. First Dist.), in which the state's granting of "paid three-hours-off for state employees on Good Friday" was held violative of the Establishment Clause. *Rankins*, 593 F.2d at 859.

Second, permitting the absence of the plaintiff on his holy days did not constitute "preference of one religion over another." 593 P.2d at 859. On the contrary, the regular school calendar provided holidays on the principal Christian holy days, so that the effect of permitting absences without pay to plaintiff on *his* holy days "is simply to lessen the discrepancy between the conditions imposed on [the plaintiff's] religious observances and those enjoyed . . . by adherents of majority religions," *ibid.*

Thus, the dismissal of the appeal in *Rankins* (from which three Justices dissented, 444 U.S. 986) does not control this case, indeed it does not even inform the analysis required to resolve the issue posed in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF THE UNITED STATES

No. A-22

SMITH STEEL WORKERS D.A.L.U. 19806, AFL-CIO,
Petitioner

v.

DARREL C. NOTTELSON, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AND A. O. SMITH CORPORATION

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 18, 1981.

/s/ John Paul Stevens
JOHN PAUL STEVENS
Associate Justice of the Supreme Court of the United States

Dated this 13th day of July, 1981

Office - Supreme Court, U.S.
FILED
SEP 25 1981
ALEXANDER L. STEVAS
CLERK

No. 81-323

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SMITH STEEL WORKERS D.A.L.U. 19806, AFL-CIO,
Petitioner,

v.

DARREL C. NOTTELSON
and
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Court of Appeals correctly interpreted this Court's holdings concerning religious accommodation under the Civil Rights Act of 1964.

II. Whether the religious accommodation provision of the Civil Rights Act of 1964 is a constitutionally permissible accommodation of the First Amendment right to free exercise of religion and thus does not violate the Establishment Clause.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-323

SMITH STEEL WORKERS D.A.L.U. 19806, AFL-CIO,
Petitioner,

v.

DARREL C. NOTTELSON

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

This brief is in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit filed by Smith Steel Workers D.A.L.U. 19806, AFL-CIO (hereinafter the "Union"). A. O. Smith Corporation was also a Defendant in the district court and an Appellant in the court of appeals. A. O. Smith Corporation (hereinafter the "Company") has filed a separate Petition (No. 81-97) seeking review of the decision below. Respondent, Darrel C. Nottelson, has filed a Brief in Opposition to the Company's Petition and since the legal issues involved in the Company's Petition and the Union's Peti-

tion are similar, much of what was said by Respondent in response to the Company's Petition is applicable to the Union's position.

OPINIONS BELOW

The District Court entered three memoranda and orders. The first, dated December 7, 1979, is reported at 481 F. Supp. 756 and is reprinted in the Company's Supplemental Appendix beginning at B-1. The second, dated April 18, 1980, is reported at 489 F.Supp. 94 and is reprinted in the Company's Supplemental Appendix beginning at B-25. The third, dated September 18, 1980, is unreported and is reprinted in the Company's Supplemental Appendix beginning at B-45. The District Court entered a judgment on April 18, 1980, which is reprinted in the Company's Supplemental Appendix beginning at B-19. The decision of the Court of Appeals is reported at 643 F.2d 445 and is reprinted in the Company's Appendix beginning at A-1. The court of appeals' order denying rehearing is reprinted in the Company's Supplemental Appendix beginning at E-1.

SUMMARY OF ARGUMENT

Petitioner claims, in effect, that an exception is carved out of Title VII of the Civil Rights Act of 1964 law for union security provisions. It is the Union's claim that Title VII conflicts with the provisions of the National Labor Relations Act (NLRA), and the NLRA must control on the basis of national policy. The Union also claims that Section 701(j) of Title VII violates the Establishment Clause of the First Amendment and must be struck down. All of the courts of appeals ruling on these issues (Fifth, Sixth, Seventh, and Ninth) have rejected both of these arguments and held that Title VII requires that unions attempt to accommodate those individuals who hold religious beliefs that proscribe union membership or financial support.

Respondent, Darrel C. Nottelson, claims that Title VII's objectives and the NLRA must be read together to arrive at congressional will. This Court has ruled that the individual's rights to equal employment opportunities, as guaranteed by Title VII, are to be given priority over majoritarian concepts embraced in the NLRA. Subsequent legislation gives support to this view.

Title VII's religious accommodation provisions do not violate the Establishment Clause. Since *Sherbert* v. *Verner*, 374 U.S. 398 (1963), this Court consistently has recognized that "benevolent neutrality" required under the Establishment Clause permits legislatures and even sometimes requires courts to provide for the accommodation of religious beliefs.

Under this Court's Establishment Clause test, Section 701(j) of Title VII has a secular purpose, does not have a primary effect of advancing religion, and does not excessively entangle the state in religious affairs. Thus it does not violate the Establishment Clause.

STATEMENT OF THE CASE

Nottelson's Religious Convictions

Darrel C. Nottelson became a member of the Seventh-day Adventist Church in May, 1966. It is an historical teaching of the Seventh-day Adventist Church that its members should not join or financially support labor unions and similar organizations.

Although Nottelson's religious convictions on the labor union issue evolved over a period of time through his studying the *Bible* and the teachings of his Church, at the time he took his stand he believed that it would be a sin if he violated his conscience by continuing to belong to or financially support the labor union.

The Actions of the Parties Prior to Commencement of This Suit

By December, 1974, Nottelson reached the point where, because of his religious beliefs, he felt compelled to sever all ties with the Union. As a result he notified the president of the local Union of his decision and requested a meeting. On December 11, 1974, the Union president met with Nottelson and three representatives from his Church, including the director of religious liberty for the regional headquarters of the Church. At this meeting the religious liberty director suggested that Nottelson's beliefs could be accommodated if Nottelson were permitted to pay, in lieu of union dues, the equivalent amount to a non-union, non-religious charitable organization.

The Church representative explained that the AFL-CIO Executive Council had adopted a policy recognizing the religious convictions of individuals who could not belong to labor unions or financially support them and asked all affiliated unions and internationals to adopt this principle as their policy. The Union president was told that many unions had accommodated such religious belief by permitting an employee to make a charitable contribution in lieu of union dues.

On December 18, 1974, Nottelson, by letter to the Union president, resigned from the Union and again requested that the Union make "a reasonable accommodation" for his religious beliefs "in harmony with the recommendations of the AFL-CIO Executive Council." This was submitted to the local Union's executive board.

On January 21, 1975, Nottelson, accompanied by his minister, appeared before the executive board. Nottelson explained his religious beliefs and why he was opposed to being a member of or supporting a labor organization. Nottelson also again stated that he would be willing to pay an amount equal to union dues to a charitable organization. No one from the board offered any alternative suggestion.

On February 4, 1975, the board denied Nottelson's request for an accommodation. The board stated that "they could not . . . make an exception since it would be contrary not only to the Union's Constitution and Bylaws but to the labor agreement negotiated with the A. O. Smith Corporation." This was the board's only basis for rejecting Nottelson's proposal.

Although the Church's representative had discussed the requirements of Title VII with the Union president on December 11 and had furnished him and the board with copies of the law and the EEOC interpretation of the religious accommodation requirements of Title VII, the board never discussed the Title VII accommodation requirements during the February 4 board meeting.

In the absence of any agreement with the Union, Nottelson unilaterally commenced paying an amount equivalent to his union dues to the American Cancer Society in order to show his good faith. Nottelson again asked to be heard by the Union board, which scheduled a meeting for April 8, 1975.

Prior to the April 8 meeting, the secretary-treasurer of the Union contacted a regional director of the national AFL-CIO to inquire about the "Statement by the AFL-CIO Executive Council on Union Membership and Religious Objectors" dated September 20, 1965. The regional director advised that such a resolution had been adopted and suggested that the secretary contact the AFL-CIO headquarters in Washington. He also advised that such an accommodation could be made, notwithstanding the union security provisions of a collective bargaining agreement. The secretary-treasurer requested a copy of the statement by the AFL-CIO Executive Council, which was mailed to her by the AFL-CIO national headquarters on March 25, 1975, and which she received before the April 8 meeting.

On April 8, 1975, Nottelson again appeared before the executive board requesting that the board reconsider its

February 4 decision. At this meeting Nottelson again asked that he be permitted to pay his dues to a charitable organization.

The Union president was aware of the action by the AFL-CIO Executive Council, and he had no question that that was still the policy of the AFL-CIO Executive Council. For this reason he did not feel any further need to seek the advice of the national AFL-CIO.

The executive board at the April 8 meeting ignored the fact that the AFL-CIO regional director had stated that an accommodation along the lines of Nottelson's suggestion was not only permissible but in accordance with AFL-CIO national policy. The board again took the position that to grant Nottelson's request would be contrary to the Constitution and Bylaws of the union.

On April 15, 1975, the Union notified the company that Nottelson had been expelled from the Union for non-payment of dues. On April 17 the company issued to Nottelson a notice entitled "Expelled Union Members."

Nottelson appealed the decision of the Union board to the Union membership. His appearance was scheduled for the membership meeting of April 23, 1975. At the membership meeting the secretary-treasurer read the recommendation of the executive board of the local exactly as it appeared on the agenda.

Nottelson then made his presentation to the membership. The Union president, who chaired the meeting, made a statement to the effect that unless there was a motion to overturn the decision of the executive board, the matter would be considered closed. No one spoke, and the chairman went on to the next order of business.

The Union president also stated that he never discussed the requirements of Title VII with the membership of the union. There was no suggestion at this meeting of any other alternative accommodation for Nottelson. The day

after the membership meeting the Company informed Nottelson he was going to be fired for non-payment of union dues.

The Parties' Actions After Filing of This Suit

The Union told Nottelson on April 17, 1975, that he would be fired. On April 23 he filed action in the District Court seeking injunctive relief pending final disposition of the charges which had been lodged with EEOC.

On April 30 the District Court heard Nottelson's motion for a temporary restraining order and issued a temporary restraining order extending to May 23, 1975, at which time a full hearing was scheduled to hear proofs on the issuance of a temporary injunction.

On May 7, 1975, a member of the Union's executive board wrote to Nottelson acknowledging his letter of December 18, 1974, in which he had asked the Union to allow him to drop Union membership and to cease paying dues and fees to the Union. The letter stated that the Union was willing to free Nottelson from remaining a member of the Union, but insisted that he continue to financially support it.

On July 3, 1975, the Equal Employment Opportunity Commission (EEOC) issued its determination that there was reasonable cause to believe that both the Company and the Union had engaged in unlawful employment practices against Nottelson.

On July 10 Nottelson, the Company, and the Union, by their respective attorneys, appeared at EEOC for a scheduled conciliation conference. After the conference, at which all parties agreed that conciliation efforts had failed, a memorandum was signed by attorneys for each of the parties setting forth their respective positions. The Union stated it was not willing to make any accommodation other than as specified in its May 7 letter. The Company claimed only to be a stakeholder. Nottelson claimed that the Union

and Company had failed to make or offer any reasonable accommodation.

The district court, ruling on Nottelson's motion for preliminary injunction, held that it did not, at that time, have jurisdiction over the matter because a Notice of Right to Sue had not yet been issued by EEOC although its issuance was imminent.

On July 11, 1975, a representative of the Company called Nottelson at his home to tell him that he was terminated as of that date. Nottelson indicated that he had accumulated vacation time and asked if he could go on vacation instead of being dismissed.

A Company representative called the secretary-treasurer of the Union to see if the union would consider "such a deviation." The Union executive committee responded with "no deviation." The Company then informed Nottelson that it would not even extend the termination date for two more weeks even though the collective bargaining agreement was silent on the question.

Non-Discrimination Provision in Union Contract

Although the collective bargaining agreement, in effect, did contain a union security provision, it also contained a nondiscrimination provision which stated in pertinent part: "The company and the union agree that there shall be no discrimination because of . . . religion . . . ." One of the Union's witnesses and the chairman of its grievance committee testified that in interpreting other provisions of the collective bargaining agreement the particular provision of the contract relating to discrimination had to be taken into consideration.

The "Charity-Substitution" Accommodation

The associate director of the Department of Public Affairs and Religious Liberty of the General Conference of Seventh-day Adventists testified about the use of the

"charity-substitution" accommodation at both the May 23, 1975, hearing and the September 2, 1977, trial. He testified that the "charity-substitution" method of accommodation had its origin in a labor committee of Congress, had been embraced by many labor organizations as a workable accommodation, and had proved to be acceptable to most of those individuals who hold religious views against the payment of dues to a labor union. As a result the Seventh-day Adventist Church has counseled its members to request and accept this kind of accommodation.

On May 28, 1965, George Meany, the president of the AFL-CIO, submitted a letter to the Special Subcommittee on Labor of the House Committee on Education and Labor. He stated that he was "strongly of the view that unions and employers should undertake to accommodate religious objections with regard to union security arrangements." He stated that "I believe that unions, and employers, too, should accommodate themselves to genuine individual religious scruples, and I am sure that all of our unions will take that view too." He then announced: "I intend accordingly to propose to the AFL-CIO Executive Council that it adopt a strong policy statement to that effect." Less than four months later the Executive Council of the AFL-CIO did in fact adopt such a policy statement. A representative of the General Conference of Seventh-day Adventists testified that Meany, in his presence, assured the Congress that labor would take care of accommodating "these people."

The local Union president testified that a directly affiliated union, such as the defendant Union, answers directly to the AFL-CIO Executive Council. He further stated that the final determination of "matters of national policy" come from the AFL-CIO Executive Council and that it is the Executive Council that formulates national policy.

Undue Hardship?

The Union president admitted that the company paid his salary. The Company also pays the salaries of the Union's

grievance committee while it meets on company premises, where it spends the majority of its time. Likewise, the Union's negotiating committee is paid by the Company for up to eight hours a day if it is on Company premises.

The Union president was questioned during redirect examination by the Union's attorney as to whether Mr. Nottelson's not paying his monthly union dues would financially break the union. To which the president responded, "No." Further, his only stated concern was that if the union accommodated Nottelson, it would destroy the fair-share concept and have a steamrolling effect. On cross examination the president admitted that he had never heard of any union where there had been a "steamroller effect" and a big fallout of union membership or discontent as a result of a union making such an accommodation. He further admitted that he had not even attempted to find out what effect the charity-substitution accommodation had on those unions that had tried it. He also stated that he had absolutely no knowledge of any union that had been harmed by making such an accommodation.

At the conclusion of the trial, a Company representative, in responding to an inquiry of the court, stated that if the Union had granted the accommodation sought by Nottelson, it would have presented no problem to the Company.

Special Employment Impediments Faced by Nottelson and Those with Similar Religious Beliefs

While looking for another welding job after he was fired by the Company, Nottelson became acquainted with the major hiring factories in the Milwaukee area. The bigger factories were all covered by union-security provisions in their collective bargaining agreements and therefore any available jobs would have demanded union membership. The Union president, in his testimony, admitted that based upon his experience and contact with other union people, most of the larger manufacturing plants in the Milwaukee area are unionized and Milwaukee is a "union town."

REASONS FOR DENYING THE WRIT

"Plainly, national labor policy embodies the principles of nondiscrimination as a matter of highest priority . . . and it is commonplace that we must construe the NLRA in light of the broad national labor policy of which it is a part." Emporium Capwell Co. v. *Western Addition Community Organization,* 420 U.S. 50, 60 (1975).

THE JUDGMENT OF THE SEVENTH CIRCUIT IS CLEARLY CONSISTENT WITH THE HOLDINGS OF THIS COURT AS TO THE IMPACT OF TITLE VII ON NATIONAL LABOR POLICY AND THIS COURT'S TEACHINGS CONCERNING THE ESTABLISHMENT CLAUSE. THERE IS NO CONFLICT IN THE CIRCUITS ON THESE ISSUES.

The Union in effect urges this Court to upset the decisions of the Fifth, Sixth, Seventh, and Ninth Circuits[1] and hold that Title VII of the Civil Rights Act of 1964, as amended, provides no protection for those who religious beliefs proscribe union membership or financial support. In order to accomplish this, the Court would have to read into Title VII law a special exemption for labor unions which does not appear anywhere within the text of Title VII. The Union also asks this Court to invalidate § 701(j) of Title VII. This would require the Court to not only reject the holdings of four Circuit Courts of Appeals but its own teachings on the issue of religious accommodation as embodied in *Sherbert* v. *Verner, supra.*

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[1] *See Cooper* v. *General Dynamics,* 533 F.2d 163 (5th Cir. 1976), *cert. denied sub nom. IAM* v. *Hopkins,* 433 U.S. 908 (1977); *McDaniel* v. *Essex International, Inc.,* 571 F.2d 338 (6th Cir. 1978); *Anderson* v. *General Dynamics Corp.,* 589 F.2d 397 (9th Cir. 1978), *cert. denied,* 442 U.S. 921 (1979); *Burns* v. *Southern Pacific Transportation Co.,* 589 F.2d 403 (9th Cir. 1978), *cert. denied,* 439 U.S. 1072 (1979) and *Yott* v. *North American Rockwell Corp.,* 602 F.2d 904 (9th Cir. 1979), *cert. denied,* 100 S.Ct. 1316 (1980).

The Union contends that all of the appeals courts which have examined the issues involved here have come up with the wrong conclusion and therefore this Court must assume the judicial responsibility to reconcile separate congressional enactments (Title VII and the NLRA). Petition at 9. The Union says this Court should grant a Writ of Certiorari "to remove Title VII and the EEOC from an area into which they have erroneously been thrust by the lower courts." Petition at 9.

What is clear is that it was not just the lower courts but the Congress also that believed that Title VII was applicable to "all aspects of religious observance and practice, as well as belief," 42 U.S.C. § 2000e-(j), and that no special exemption had been carved out of Title VII law, *sub silento,* for union security arrangements.

I. This Court Has Recognized That The Broad National Labor Policy Gives Priority To The Mandate Of Title VII.

As our society has become more complex, industrialized and impersonal, it has become correspondingly more difficult for individuals to find employment where their religious needs are voluntarily accommodated. Many have faced the economic hardships of unemployment as a result of their religious connections.

Congress, in adopting Title VII of the Civil Rights Act of 1964, attempted to root out discrimination in the private sector of employment. As the Chief Justice stated in *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), the purpose of Title VII was to achieve equality of employment opportunities.

This Court in *Griggs,* in arriving at the proper legal defiintion of the term "discrimination" under Title VII law, rejected the concept of "ill will." It also held that the terms meant more than "unequal treatment." Although unequal treatment is an illegal discriminatory practice, the *Griggs* Court held that Title VII is also directed against

the "consequences" or "effects" of an employment system. According to *Griggs*, if an employment practice operates to exclude a minority, it is illegally discriminatory. "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."

The Court in *Griggs* also held that good intent or absence of discriminatory intent does not redeem a system which operates as "built-in-headwinds" for minority groups.

At the same time that Congress made it unlawful for an employer to fail or refuse to hire, to discharge or otherwise to discriminate against an individual because of race, color, sex or national origin, it also proscribed similar employer conduct on the basis of religion. 42 U.S.C. § 2000e-2(a).

In addition, Congress specifically stated that it is an unlawful employment practice for a labor union to discriminate against an individual because of his/her religion or to cause or attempt to cause an employer to discriminate against an individual in violation of the Civil Rights Act. 42 U.S.C. § 2000e-2(c)(1) and (c)(2). One exception is set forth in the statute, that being unintentional discrimination resulting from the implementation of a bona fide seniority or merit system. See 29 U.S.C. § 2000e-2(h).

Congress therefore sought to eradicate religious discrimination by employers and unions at the same time as it sought to eliminate discrimination as to race, color, sex, and national origin.

In 1967 the federal Equal Employment Opportunity Commission adopted "Guidelines on Discrimination Because of Religion." These Guidelines decreed that the duty not to discriminate on religious grounds included an additional obligation on the part of the employer to accommodate the religious practices of employees or prospective

employees so long as they did not impose an undue hardship on him. 29 C.F.R. 1605.1 (1967).

In 1972, after certain court decisions had cast some doubt on the EEOC religious discrimination Guidelines and the whole area of religious discrimination, Congress, in an attempt to clarify its position on religious discrimination in the private sector, amended Title VII, clearly stating that an accommodation must be made for an individual's religious observance, practice, and belief, if that could be done reasonably without undue hardship to the employer. 42 U.S.C. § 2000e(j) [§ 701(j) of Title VII].

The 1972 amendment to Title VII provides:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Although there was considerable disagreement in the Congress as to the enactment of the Civil Rights Act of 1964 and the subsequent amendments thereto, the adoption of the 1972 amendment was effected without dissent in the Senate.

It should be recognized that the area of religious discrimination has a somewhat unique position in the legislatively protected areas of Title VII. Discrimination on the basis of race, color, sex, or national origin usually affects a substantially large and identifiable class. Religious discrimination, on the other hand, generally involves only a one-to-one situation. The accommodation standard written into law requires the courts to weigh the impact of specific employment practices on a specific individual's religious practices and then fashion an individual remedy.

The Union in its Petition argues that Congress' determination concerning the legality of various forms of union security are a central component of the National Labor

Policy and cites for support of this statement a 1947 Senate report. Petition at 10-11.

The Union ignores the fact that congressional labor law and social-policy concerns have changed drastically since 1947. The problems of the 1930's and 1940's are not the congressional problems of the 70's and 80's. The congressional concern for the nascent labor movement in the 30's and 40's changed over a period of years from near absolute protection of the majoritarian interest of organized labor to the preservation of equal employment opportunity for the individual free from discrimination by design or consequence.

In *Emporium Capwell Company* v. *Western Addition Community Organization, supra* at 60, this Court declared that the National Labor Relations Act must be construed "in light of the broad national policy of which it is a part." This Court held that national labor policy embodies the principle of non-discrimination as a matter of highest priority. Therefore, in construing the NLRA, courts must not ignore other legislative enactments, including Title VII, and public policy.

In *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court unanimously ruled that Title VII employee rights could not be foreclosed by binding arbitration. Mr. Justice Powell stated that by its very nature Title VII "stands on plainly different ground; it concerns not majoritarian process, but an individual's right to equal employment opportunities." According to the Court, "Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices." *Id.* at 51.

Title VII's public policy objective of equal employment opportunities regardless of race, sex, or religion and the National Labor Relations Act and its objective of labor peace must be read together to arrive at the proper con-

gressional will. "Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions." *Boys Markets, Inc.* v. *Retail Clerk's, Local 770,* 398 U.S. 235, 250 (1970).

The above principles are the basis of and sustain the holdings of the Fifth, Sixth, Seventh, and Ninth Circuits, which have found that § 701(j) of Title VII is applicable to union security provisions when such provisions clash with religious beliefs and impede the policy of equal employment opportunity for all.

Simply stated, § 701(c) and § 701(j) of Title VII require the union to observe, as *Alexander* v. *Gardner-Denver Co., supra,* suggests, that although their union has, by law, been accorded certain privileges because of the majoritarian process, individuals who hold religious views that may be different from the majority have also been granted certain rights by law. Congress has stated that in such a confrontation, the individual's rights to equal employment opportunities, as guaranteed by Title VII, take priority.

The Union claims that the religious accommodation requirements of Title VII may not touch upon union security arrangements because when Congess in 1977 amended the National Labor Relations Act and extended coverage of the Act to employees of non-profit hospitals, it then exempted "any employee of a health-care institution who is a member of and adheres to established and traditional tenets or teachings of a bona fide body or sect, which has historically held conscientious objections to joining or financially supporting labor organizations" from union security agreements.

But, the enactment of § 19 of the NLRA went far beyond the requirements of Title VII. Legislative history of § 19

of the NLRA confirms that Congress was aware that among the employees of health-care institutions were *large* numbers of employees whose religious beliefs would keep them from paying dues to a union. The legislative history noted that the Seventh-day Adventist Church itself operates 41 non-profit hospitals and that a substantial number of employees employed by these hospitals are members of the Seventh-day Adventist Church. Because a large concentration of individuals within a hospital operated by the Church might well have religious objection to union membership, there existed the probability that the "undue hardship" legislative test provided for in § 701(j) of Title VII would be applied to defeat those employees' accommodation rquests. A union might successfully assert that the large number of employees employed in the health-care field seeking accommodation would constitute an undue hardship to the union. The 1974 religious exemption provision in § 19 of the NLRA thus precluded such a defense.

It is clear that recent legislation amending the National Labor Relations Act to require accommodation of those holding religious objections to the payment of union dues also confirms prior legislative intent.

In December, 1980, Congress amended § 19 of the NLRA to provide for a charity-substitution accommodation for all religious objectors who were covered by the NLRA, not just those in health-care P.L. 96-593. Thus, this new law expanded the *absolute* religious exemption for health-care employees, 29 U.S.C. § 169, to *all* employees covered by the NLRA.

Contrary to the Union's suggestion that the NLRA is the sole and exclusive protection for religious objectors, the legislative history of the new accommodation provision of the NLRA clearly reveals that Title VII religious accommodation requirements and NLRA religious exemption provisions are meant to be complementary and together work for the national policy of equal employment oppor-

tunity and nondiscrimination. 126 Cong. Record, H 758-796 (daily ed. Feb. 11, 1980). Particular attention should be given to the comments of Representative Clausen, one of the co-sponsors of the "Conscience Clause" bill, wherein he sets forth the purpose of this legislative provision. In his remarks he noted recent federal-court decisions upholding the religious accommodation provisions of Title VII and stated:

> The legislative history of the proposed amendment to the National Labor Relations Act indicates that the bill and Title VII were meant to be complementary. The purpose of the previous bills and the purpose of this bill is to resolve any conflict and to express congressional intent as to the reasonableness of a charity substitution accommodation which all of the federal courts of appeal ruling on the issue have found to be an accommodation acceptable under Title VII.

126 Cong. Record, H 763 (daily ed. Feb. 11, 1980).

Comments of the co-sponsors of this new statute indicate that Congress sought to reinforce and make even clearer the fact that the charity-substitution type of an accommodation is the kind of accommodation that Congress had in mind when adopting § 701(j) of Title VII. The purpose is to resolve and stop conflicts and costly litigation. It was passed by the Congress to express congressional intent as to the reasonableness of the charity-substitution accommodation which all of the federal courts of appeals ruling on the issue have found to be an accommodation acceptable under Title VII. Passage of the amendment to the NLRA provides added support for court decisions which hold that charity-substitution should be considered a reasonable accommodation under Title VII. This, however, does not subtract from Title VII's mandate nor cloud the correctness of the decision of the district and appeals court in this case.

The Union seems to argue that Title VII relief for religious objectors cannot stand side by side with the exemp-

tion provided in the NLRA. This suggestion has been inferentially rejected by this Court. In *Alexander* v. *Gardner-Denver, supra* at 47, this Court said that "legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination." If the NLRA were determined to be the only vehicle available to provide for religious accommodation in this area, a large segment of the workplace of this country would be unprotected. Railway workers are not protected by the NLRA but are governed by the Railway Labor Act. State employees also fall outside the parameters of the NLRA.

As recognized by the appeals court below, "[t]he question of religious accommodation simply was not addressed when Congress was considering the enactment of Sections 8(a)(3) and 8(b)(2) and when Title VII was enacted the Act did" not itself provide an exemption for unintentional discrimination resulting from the enforcement of union security clauses as it does, for example, for unintentional discrimination resulting from the implementation of a bona fide seniority or merit system."

The court below thus correctly observed:

> Given the absence of such an express exemption and the complete lack of evidence that Congress intended the courts to imply such an exemption from the NLRA, we join with the Fifth, Sixth and Ninth Circuits in holding that the union security provisions of the NLRA do not relieve an employer or a union of the duty of attempting to make reasonable accommodation to the individual religious needs of employees.

Also in *Lumber Workers Local 2363* v. *Wondzell*, 444 U.S. 1040, 48 L.W. 3465 (Jan. 2, 1980), this Court dismissed an appeal from the Alaska Supreme Court for want of a substantial federal question. The Alaska Court held that a state statute equivalent to Title VII requires a charity-substitution accommodation, 601 P.2d 584 (Alaska Sup. Ct.

1979). The union appealed with the following question being presented:

> May a labor union be forced to waive its contractual right to a union shop, sanctioned under 29 U.S.C. 158(a)(3), in order to reasonably accommodate the religious beliefs of an employee as mandated by the Alaska State Human Rights Law, AS 18.80.200-280?

The dismissal of the appeal constitutes a ruling on the merits. *Hicks* v. *Miranda*, 422 U.S. 332, 343-345 (1975).

If the religious accommodation provisions of Title VII have any force and meaning whatsoever, they must strike down and prevent the absolute disregard for religious needs which the Union exhibited toward Darrel Nottelson in this case.

II. Section 701(j) Of Title VII Does Not Violate The Establishment Clause Of The First Amendment But Rather Fulfills The Principle Of Free Exercise Of Religion.

The Union claims that under the NLRA and prior to the enactment of Title VII religious objectors had no right to be relieved from the burden of union-security clauses which impacted on their religious beliefs. It cites Judge Learned Hand in *Otten* v. *Baltimore & O.R. Co.*, 205 F.2d 58, 61 (2nd Cir. 1953), for the proposition that "[w]e must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life . . . ."

This judicial philosophy, however, does not reflect the teachings of this Court in *Sherbert* v. *Verner*, *supra*, and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), which held that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Id.* at 215.

Since *Steele* v. *L. & N.R. Co.*, 323 U.S. 192 (1944), it has been recognized that federal labor legislation which bestows broad powers on labor unions involves state action.

In *Railway Employee's Dept., AFL-CIO* v. *Hansen*, 351 U.S. 225 (1956), this Court declared that it is the federal government which is the effective force upon the employee in this situation. The collective bargaining agreement has "the imprimatur of federal law upon it," and "the federal statute is the source of power" by which the right of the individual is "lost or sacrificed". *Id.* at 232. See also *Linscott* v. *Millers Falls*, 440 F.2d 14 (1st Cir. 1971), *cert. denied*, 404 U.S. 872 (1971); *Gray* v. *Gulf, Mobil and Ohio Ry. Co.*, 429 F.2d 1064 (5th Cir. 1970), *cert. denied*, 400 U.S. 1009 (1970).

In *Linscott* v. *Millers Falls, supra*, the court of appeals applied the Free-Exercise balancing test but found there was a stronger governmental interest in the union shop than in religious free exercise. *Id.* at 17-18. But congressional priorities have changed as evidenced by the NLRA. This Court has the right to take judicial notice of legislative facts in interpreting and developing law. *Weinstein's Evidence*, § 200[3] (pages 200-14 & 15). It is clear that a new legislative attitude and governmental concern has developed. Our lawmakers now believe that religious liberty should prevail over national labor law policy on the question of union security. Even organized labor, as personified by the AFL-CIO Executive Council, generally has acknowledged that the religious rights of workers must be accommodated. Governmental agencies such as the Equal Employment Opportunity Commission seek to implement this new governmental concern. This court will find ample evidence in this in the legislative history and debates on legislation concerning this question. See 126 Cong. Record H759-765 (daily ed. Feb. 11, 1980) and 126 Cong. Record S16615-16 (daily ed. Dec. 15, 1980).

What might have been held to be a "compelling interest" at the time *Linscott* and similar cases were decided no longer carries the same force. These cases predate the

adoption of the reasonable accommodation requirements of Title VII and the growing public concern for individual equal employment opportunity and religion-based rights. In light of these facts there is today no compelling governmental interest justifying this infringement of one's religious beliefs and practices. The Chief Justice, in referring to the preferential position of the First Amendment, recently noted that "[t]he values enshrined in the First Amendment plainly rank high 'in the scales of our national values.'" *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979). In applying the Free Exercise balancing test there should be no greater compelling governmental concern than the protection of the First Amendment rights of its people.

Sherbert v. *Verner, supra* at 407, makes clear that at times the government is required under the free exercise clause of the First Amendment to take affirmative steps to remove barriers to the free exercise of religion by making special provisions for religious interests in order to relieve them from both direct and indirect burdens placed on the free exercise of religion as a result of increased governmental involvement in societal affairs.

Nottelson claims that the Free Exercise Clause of the First Amendment requires an accommodation for his religious convictions. This Court in *Zorach* v. *Clauson*, 343 U.S. 306 (1952), suggested that "separation of church and state" is not an independent principle, that the principle is that of religious liberty. The religion clauses of the First Amendment must be read together, and religious liberty is to be protected by the First Amendment against government action either establishing religion or prohibiting its free exercise.

Sherbert v. *Verner, supra,* was not only a decision dealing with the Free Exercise Clause. As an Establishment case, *Sherbert* is significant in that it makes clear that exemptions solely on the basis of religion are not necessarily establishments of religion if they are designed to protect

the Free Exercise of religion. The purpose of § 701(j) is to accomplish just that.

In *Zorach, supra,* this Court recognized the principle of religious accommodation and noted that the people of the United States are in fact a religious people. This accommodation is permitted in order to maintain a neutrality between religious believers and nonbelievers.

In *Sherbert* this Court noted that the state had denied Mrs. Sherbert her First Amendment rights under the Free Exercise Clause because there was no compelling state interest to justify the infringement of her Free Exercise rights. It also made clear that although judicial action declaring a practice a violation of the free exercise clause might be construed as carving out an exception on the basis of religion, such an exception may be compelled by considerations of Free Exercise and cannot be regarded as an establishment of religion.

This Court reviewed the relationship existing between the Free Exercise and Establishment Clauses of the First Amendment in *Walz* v. *Tax Commission of City of New York,* 397 U.S. 664, 669-70 (1970):

> Each value judgment under the religion clauses must . . . turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so. Adherence to the policy of neutrality that derives from an accommodation of the establishment and free exercise clause has prevented the kind of involvement that would tip the balance toward government control of churches or government restraint on religious practice.

As stated above, Congress bestowed broad powers on labor unions. The collective bargaining agreement has "the imprimatur of federal law upon it." But when government is involved in *limiting* religious freedom, the government *may* employ affirmative or exemptory measures to restore that degree of religious freedom which had existed before the

government involvement. This has been referred to as "legislative free exercise" and can be viewed as the effort by the legislature to overcome hostility to religion by an act of the state. The Court has recognized that Congress has the power to take some affirmative measure or grant an exemption in order to insure that the religious needs of individuals are satisfied.

This Court in *Walz, supra* at 673, declared that "[t]he limits of permissible state accommodation to religion are by no means coextensive with the non-interference mandated by the Free Exercise Clause." Thus, the legislature may go further than is constitutionally required under the Free Exercise Clause in an attempt to accommodate where government action has been involved in limiting the religious freedom of an individual.

Section 701(j), as here applied, does not violate the Establishment Clause but rather protects the Free Exercise of religion.

The Director of Public Affairs and Religious Liberty of the international headquarters of the Seventh-day Adventist Church testified at the May 23, 1975, hearing concerning the problems faced more and more by members of the Church. He stated that there was a time when Seventh-day Adventists could go into public employment or into various professional fields and not be affected by union security agreements. However, he further stated:

> Today these areas are prime targets for organization and large success has already accompanied those organizational drives and so with very few exceptions, there is hardly a single profession today or skill that in one way or another is not controlled for the organizational drive is on. So the Seventh-day Adventists have been driven with their backs to the wall. They cannot any longer seek peacefully another way to make a living. The only thing they could do is flee the country . . . and we don't want to flee.

CONCLUSION

The days of many kinds of discrimination are, hopefully, only fading memories in this country. Gone are the signs, "No Irish Need Apply" and "No Colored Need Apply." Petitioner, the Union, figuratively speaking, seems to long for the opportunity to put in the window of the Company's personnel office a sign "No Seventh-day Adventist Need Apply."

But the decision of all the Court of Appeals that have decided the issues in this case have clearly held that Union and Company must not practice religious discrimination. These decisions reflect Congress' desire that under the Free Exercise Clause of the First Amendment, religious discrimination will be abolished from employment relationships in our Nation and that reasonable accommodations that don't create undue hardships will be made for religious dissenters. Such accommodations do not violate the Establishment Clause of the First Amendment.

As Professor Tribe has noted:

> [W]e must consider whether a nation committed to religious pluralism must, in the age of affirmative state, make active provision for maximum diversity; we must ask whether, in the present age, religious tolerance must cease to be simply a negative principle and must become a positive commitment that encourages the flourishing of conscience. . . . [I]t seems doubtful that sacrificing religious freedom on the altar of anti-establishment would do justice to the hopes of the Framers or to a coherent vision of religious autonomy in the affirmative state.

L. Tribe, *American Constitutional Law* 834 (1978).

The decision of the Seventh Circuit does not conflict with the decisions of any of its sister circuits nor is there any conflict with a state court of last resort. The decision is equally in accord with the holdings of this Court and car-

ries out the will of Congress. Thus, the Petition should be denied.

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No. 81-323

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SMITH STEEL WORKERS D.A.L.U. 19806, AFL-CIO
Petitioner,

v.

DARREL C. NOTTELSON

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONER

Subsequent to the filing of the petition herein, petitions have been filed in two other cases presenting the same issues. *United Steelworkers of America, Local 8141* v. *Tooley*, No. 81-572 [1]; *International Association of Machinists, Lodge 50* v. *Anderson*, No. 81-679.

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[1] The petition in *Tooley* raises a third question not presented by *this* petition: the application of § 701(j)'s "undue hardship" exception to a union that is confronted with the loss of six religious objectors' dues totalling $1,200 per year (3% to 5% of the union's total revenue). The only "undue hardship" issue in the instant case is raised in the employer's petition, No. 81-97, and that issue concerns the employer's hardship, not the union's.

I. THE RELATIONSHIP BETWEEN TITLE VII AND THE NLRA.

a. Respondent EEOC acknowledges that although it had construed Title VII to impose a duty of reasonable accommodation prior to the 1972 amendments, it had understood that duty not to require unions to exempt religious objectors from dues obligations under union security agreements (EEOC Br. 10-11, n. 9). But the EEOC contends that its pre-1972 construction is not informative of the meaning of the almost identically-worded "reasonable accommodation" duty expressly enacted by Congress in the 1972 amendments to Title VII:

> [T]he Commission did not believe that its [pre-1972] guidelines could create an exception to the National Labor Relations Act. However, such an exception was expressly created by Congress in 1972, when it enacted Section 701(j). [*Ibid*].

But 701(j) does not "expressly" create such an exception; the issue is whether the general language of § 701(j) should be construed as impliedly repealing in part the Congressional decision in the NLRA to permit agreements requiring uniform financial support of collective bargaining representatives by the represented employees. And the rationale proffered by the EEOC for construing § 701(j) differently than it had construed the pre-1972 Act will not wash.

The pre-1972 EEOC guideline did not purport to invent a duty of reasonable accommodation; rather, that guideline purported to find that duty in the non-discrimination command of Title VII as enacted in 1964. If that construction of the 1964 Act was correct, there was as much basis before 1972 as after to impute to Congress an intention to override the NLRA.

In 1972 Congress enacted in express terms the substance of the EEOC's guideline, "to resolve by legislation" doubts that had arisen as to whether the EEOC guideline accurately expressed the will of the 1964 Congress. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 73-74. That the 1972 Congress codified the EEOC's guideline without material change, and without a single reference to the subject of union dues in the legislative history, suggests that Congress accepted the EEOC's published view that the duty of reasonable accommodation did *not* require the exemption of religious objectors from their dues obligations.

b. That Congress had *not* intended in Title VII as enacted or amended to require exemption of religious dues objectors is further convincingly demonstrated by the debates in 1973-74 when such an exemption was expressly proposed, and rejected, under the NLRA (Pet. 15-17). Respondents offer diametrically opposite rationales for ignoring the 1973-74 debates. Respondent Nottelson proffers, without a single citation, an interpretation of those debates made out of whole cloth (Nottelson Br. 16-17); nothing in the debates suggests that Congress' thought processes were what respondent Nottelson hypothesizes. In contrast, the EEOC declares:

> That legislative history is singularly unhelpful . . . because it neither contains any reference to Section 701(j) nor provides any explanation for this omission [EEOC Br. 11].

But the debates *do* provide an "explanation for this omission": proponents and opponents of a compelled dues exemption for religious objectors unanimously agreed that existing law required no such exemption (Pet. 15-17). That § 701(j) was not mentioned reflects that Congress did not understand § 701(j) to have required such an exemption.

c. Both respondents invoke the much-later debates surrounding the 1980 amendment to the NLRA to support their construction of Title VII (EEOC Br. 11-12; Nottelson Br. 17-18). (In the case of EEOC, this invocation is made despite an acknowledgement that the 1980 NLRA amendment adopts a different substantive standard than that claimed for § 701(j) (EEOC Br. 11, n. 10; 12, n. 11).) Neither respondent suggests that these debates are informative of what *the Congress of 1972* intended in enacting § 701(j); rather, all that respondents claim that these debates show is that the 1980 Congress was aware that after 1972 the courts of appeals had construed § 701(j) to require exemption of religious dues objectors (see, e.g., the remarks of Representative Clausen quoted at Nottelson Br. 18). In determining the meaning of § 701(j), "[i]t is the intent of the Congress that enacted [§ 701(j)] in [1972], unmistakable in this case, that controls." *Cf. Teamsters v. United States*, 431 U.S. 324, 354 n. 39. The "views of members of a later Congress," expressed "after this litigation was commenced, are entitled to little if any weight." *Ibid.*[2]

d. In our petition, we relied on the holding of *Hardison, supra*, 432 U.S. at 79, that absent "a clear and express indication from Congress" § 701(j) should not be construed to impliedly repeal core principles of national

[2] The EEOC suggests that even if the Court finds the statutory issue presented in this petition worthy of review, such review should await "a case in which the lower courts have considered the significance of the [1980 NLRA] amendment" (EEOC Br. 12 n. 11). But the amendment predated the decision below, and it was discussed in the briefs of both sides on the petitions for rehearing that the court below denied. Moreover, in one of the other cases now pending before this Court on petition, *Tooley, supra*, No. 81-572, the court of appeals considered the significance of the 1980 NLRA amendment in its opinion (See petition in No. 81-572, 7-8 n. 2a, 17 n. 11, App. 4a-5a).

labor policy articulated in the NLRA. The EEOC asserts that the declaration in *Hardison* was confined to seniority systems, and was premised on the explicit protection afforded seniority systems in Title VII itself (EEOC Br. 13-14). That is a misreading of *Hardison*. The holding in question appears in Part B(1) of that opinion, 431 U.S. at 79, and is not at all linked (or confined) to the special status accorded seniority systems. In a separate portion of the opinion, Part B(2), the Court declared, as an alternative or additional basis for its holding, that the conclusion reached in Part B(1) "is supported by the fact that seniority systems are afforded special treatment under Title VII itself," *id.* at 81.[3]

II. THE CONSTITUTIONAL ISSUE.

a. Both respondents attribute to us a constitutional challenge we do not make: that § 701(j) is unconstitutional *en toto* (EEOC Br. 14; Nottelson Br. 11). We contend only, as reflected in the second question presented (Pet. i; see also *id.* at 19-20), that § 701(j), if construed to require other employees to subsidize union representation for religious objectors, is "to that extent invalid." It is the attribute of compelled monetary preference that we contend renders the construction below vulnerable under the Establishment Clause. Accommodations without that attribute, such as those actually proposed by the employer in *Hardison*, 432 U.S. at 77-78, would lie outside the ambit of our challenge.

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[3] The EEOC also argues that our reliance on national labor policy is unwarranted because "broad exceptions to the general authorization of union security clauses are . . . found in the NLRA" (EEOC Br. 14, n. 13). But that Congress prior to 1972 had made *other* exceptions to the authorization of union security clauses, but *not* an exception for religious dues objectors, proves our point, not the EEOC's.

b. The EEOC contends that § 701(j) as construed below does not impose a monetary preference, because dues objectors must contribute an amount equal to dues to charity (EEOC Br. 18 n. 17). That contention ignores (i) that many persons make charitable contributions in any event, so that under the construction below many dues objectors *will* receive a monetary benefit, in contrast to other employees who will have to make charitable contributions *in addition to* their dues payments; and (ii) that those who would have *secular* preferences for making charitable contributions in lieu of paying union dues are denied this option, which is made available to religious objectors solely on the basis of their religion.

c. The EEOC contends that even if a monetary preference *does* result from the construction of § 701(j) by the court below, that preference does not constitute "financial support of religious activity" (*ibid.*). But the EEOC overlooks that the very "religious activity" that is the subject of this case is the withholding of money from unions. As construed below, § 701(j) requires unions to furnish free representation to those who wish to engage in this "religious activity," thus compelling unions (and ultimately the other members whose dues must subsidize the religious objectors) to provide "financial support of [this] religious activity."

d. The EEOC's contention that § 701(j) as construed below "simply defines the conduct that constitutes . . . discrimination," (EEOC Br. 15 n. 14) begs the question. As this Court recognized in *Hardison*, 432 U.S. at 81, § 701(j) does not mandate "non-discrimination" in the ordinary sense of that word, it mandates special accommodations along religious lines. The permissible limits of governmental compulsion of such preferences is in-

evitably a delicate question, and one that cannot be avoided by resort to semantics.

e. Respondent Nottelson contends that Congress was *required* to exempt religious objectors from union security agreements, for otherwise Congress, which has put the "imprimatur of federal law upon" such agreements, would be violating the Free Exercise Clause. (Nottelson Br. 20-24). Passing the question whether governmental action requiring all employees to pay dues to unions would violate the Free Exercise Clause,[4] respondent's argument founders on the threshold point that the government has *not* put "the imprimatur of federal law" upon such agreements in industries regulated by the NLRA. The quoted words come from *Railway Employees' Department v. Hanson*, 351 U.S. 225, 232, in which this Court held that *the Railway Labor Act, by preempting state "right to work" laws*, put the "imprimatur of federal law" upon union security agreements. But the NLRA, unlike the Railway Labor Act, does *not* preempt state "right to work" laws. Sec. 14(b), 29 U.S.C. § 164(b). All that Congress has done in the NLRA is to refrain from *invalidating* union security agreements, and there is thus no governmental action subject to the command of the Free Exercise Clause.[5]

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[4] The lower courts have held that it would not, see Pet. 11.

[5] The EEOC notes, correctly, that governmental action would be present if a court *enforced* a union security agreement at a union's request (EEOC Br. 19-20 n. 18). But there was no such involvement in this case; here, a private employer and union voluntarily negotiated and implemented a collective bargaining agreement that does not itself constitute governmental action. *Steelworkers v. Weber*, 443 U.S. 193, 200.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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